

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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Hearing Officer Notice Soliciting Comments on Whether the :
Department Should Open an Investigation to Establish an : Case: D.T.E. 03-45
Instate Universal Service Fund :
-----X

**COMMENTS OF
RICHMOND CONNECTIONS INC. D/B/A RICHMOND NETWORKX
ON HEARING OFFICER NOTICE SOLICITING COMMENTS**

Dated: June 20, 2003

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I. INTRODUCTION

By letter dated March 5, 2003 (the "Request"), Richmond Connections, Inc. d/b/a Richmond NetWorx ("Richmond NetWorx" or the "Company")¹ requested that the Commonwealth of Massachusetts Department of Telecommunications and Energy ("DTE" or the "Department") institute a proceeding to investigate the establishment of a Commonwealth universal service fund ("USF"). The matter has been assigned to Hearing Officer Tina W. Chin, who, by Hearing Officer Notice dated May 29, 2003 (the "Notice"), solicited comments addressing two issues:

1. Whether the Department has sufficient statutory authority under existing federal and state statutes to establish a USF for the Commonwealth; and, if so,
2. Whether the Department should initiate an investigation into the establishment of a USF for the Commonwealth. (Notice, at p. 2).

As fully supported below, the answer to both these issues is an unequivocal and a resounding "yes."

¹ Richmond NetWorx is an affiliate of Richmond Telephone Company.

II. SCOPE OF THE NOTICE

Richmond NetWorx's Request indicated that it is a full service, facilities-based competitive local exchange carrier ("CLEC") serving rural Berkshire County, Massachusetts. As part of its facilities-based services in Pittsfield, Massachusetts, Richmond NetWorx contracts with Verizon New England Inc. d/b/a Verizon Massachusetts ("Verizon") for unbundled network elements ("UNEs") and collocation in Pittsfield for "last mile" connection to its own network. However, Richmond NetWorx has ascertained that its present efforts to provide residential services and to expand its operations into Great Barrington and North Adams, in North and South Counties, respectively, are hampered by current Verizon practices. Specifically, as Richmond NetWorx pointed out at page 2 of its Request,

Quite simply, competitive local exchange carriers, such as Richmond NetWorx, offering UNE-based services in rural Massachusetts cannot provide competitive rates and still cover their internal costs and Verizon's charges. In particular, Verizon's UNE rural loop rates, especially the proposed rates that it filed pursuant to the Department's recent order in D.T.E. 01-20, are significantly higher than the retail rates that Verizon charges customers in rural areas of Massachusetts. (Footnote omitted).

Citing the Department's decision in D.T.E. 01-31-Phase II Order at 83 (April 11, 2003) ("Phase II Order"), the Notice states, at page 2:

With regard to establishing a universal service support mechanism in the Commonwealth of Massachusetts, the Department recently stated that it "may, in a future docket, consider adoption of a universal funding mechanism to reduce the arbitrage opportunities and the price squeeze problems presented by the interaction of deaveraged wholesale prices and averaged retail prices." . . . The Department, however, has never investigated the merits of establishing an instate universal service fund, and neither the Department nor the parties in D.T.E. 01-31-Phase II developed a record on this issue. In addition, many, if not most, states that have adopted instate USFs, have done so with explicit state authority. . . . The Department's enabling telecommunications statutes do not contain such an explicit grant of authority. . . .

Missing from the Notice's description of the Phase II Order's relevance to the issue framed in Richmond NetWorx's Request is important prefatory language to the text quoted from page 83 of the Phase II Order. That missing language, which is reproduced below, clearly and succinctly presents the real life problem that Richmond NetWorx brings to the Department's attention.

In addition, Verizon sought and was granted in Phase I the ability to deaverage business prices by density zone, but Verizon did not seek that flexibility for residential prices. While retail prices that reflect geographic cost differences would enhance efficiency, particularly because UNE loops rates are geographically deaveraged, we do not believe deaveraging of basic residential rates would be appropriate at this time, nor does the record support such a change.

It is now time to allow Richmond NetWorx and other CLECs to produce the record for Department consideration in addressing the price squeeze scenario captured in the foregoing Phase II Order language. That price squeeze scenario is one in which Verizon's averaged residential rates in rural areas are frequently lower than its deaveraged loop UNEs, a scenario making competitive entry the faintest of possibilities.

III. DISCUSSION

A. The Department Has Sufficient Statutory Authority Under Existing Federal And State Statutes To Establish A USF For The Commonwealth

1. Federal Law

Federal law is clear, as the Notice actually recognized, that a state may create its own USF. The Notice is correct, at page 2, in its description of the Commonwealth's power to create such a regime, provided that it is not inconsistent with, or places a burden upon, the federal USF regime and that it is "specific, predictable, and sufficient." See Section 254(f) of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 254(f).

Although Section 254(f) of the Act, in and of itself, does not require a state's creation of an intrastate USF fund (i.e., Section 254(f) provides that "[a] State may adopt . . ."), that Section cannot be construed in a vacuum. Strong legal and public policy reasons exist for the proposition that a state may be in violation of Section 253 of the Act, 47 U.S.C. § 253, if its failure or refusal to craft an intrastate USF system impedes competition. Section 253(a) states that, "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

Furthermore, Section 253(b) states that:

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

The genesis of Richmond NetWorx's Request for an investigation into the establishment of a Commonwealth USF is the "cost squeeze" inherent in Verizon's residential loop UNE pricing in the rural areas mentioned by Company. Those UNEs are priced at levels higher than Verizon's rates for retail residential service. The Department recognizes this issue but, as yet, has not taken action to address it. See Phase II Order at page 83.

For all intents and purposes, Richmond NetWorx is precluded by Department action, albeit indirectly, from competing for residential customers in rural Massachusetts.² The fact that Verizon has not been allowed or required to deaverage its residential rates in rural areas, in line with its deaveraged UNE rates, precludes

competition for residential customers in those areas, in arguable violation of Section 253(a) of the Act. However, if the Department makes the policy decision that rural residential rates should not be increased in accordance with actual loop costs, as represented by Verizon's deaveraged loop UNEs pricing, then the remedy is found in Section 253(b) of the Act, namely the ability and, indeed, the necessity for Department creation of an ameliorating USF regime. While it may be true, as noted on page 2 of the Notice, that, "neither the Department nor the parties in D.T.E. 01-31-Phase II developed a record on this issue," the Richmond NetWorx Request presents the opportunity and necessity for addressing the issue.

That the Department has the necessary authority to create a state USF under Commonwealth law, even in the absence of a specific statutory directive, is established in the next section of these comments.

2. Commonwealth Law

The Notice, at page 2, expressed the concern that the Department may lack the necessary statutory power to create a USF in indicating that,

many, if not most, states that have adopted instate USFs, have done so with explicit state statutory authority, notwithstanding the federal authority contained in 47 U.S.C. § 254(f). The Department's enabling telecommunications statutes do not contain such an explicit grant of authority to create a USF in Massachusetts.

It may or may not be correct that many, if not most, states have explicit authority from their respective legislatures to create state USFs.³ No authority is cited in the Notice to

² Unlike the geographically diverse empire that is Verizon, Richmond NetWorx has no opportunity to "average away" losses incurred in high cost, rural residential service areas against remunerative residential services in lower cost, urbanized areas.

³ We are aware of several states, including Arizona and New York, in which the state regulatory agency has adopted a state USF without explicit state statutory authority. See, e.g., Docket No. U-2063-87-290, In the Matter of the Application of Arizona Telephone Company for Approval of the

support that proposition. It is correct that Massachusetts statutes do not explicitly address the creation of a Commonwealth USF. That fact, however, is not the end of the necessary inquiry. The Notice's question is, in effect, whether Massachusetts law, in the absence of specific enabling language, authorizes the creation of a Commonwealth USF. This question is answered in the affirmative.

The Department itself, in the Phase II Order at page 6, recognized the breadth of its regulatory powers in stating that the DTE's "jurisdiction for regulation of intrastate telecommunications common carriers within the Commonwealth is provided under G.L. c. 159.^[4] The Department has broad general supervisory power over the provision of telecommunications services. G.L. [c.] 159, § 12."⁵ This general supervisory power is supplemented by more specific powers, including the power: (1) to inquire into rates, charges, regulations, practices, and services of regulated carriers, G.L. c. 159, § 13; (2) to determine if rates are unjust, unreasonable, unjustly discriminatory, unduly preferential, or insufficient to yield reasonable compensation for the service rendered, and to fix just and reasonable rates, G.L. c. 159, § 14; (3) upon complaint or the DTE's own motion, to investigate the propriety of any proposed rate changes and, if a

Arizona Unity Plan, Opinion and Order, Decision No. 56639 (dated September 22, 1989). Moreover, the fact that a state legislature enacts a law authorizing or directing the state regulatory body to create a state USF does not necessarily mean that the regulatory commission lacked the power to do so absent explicit enabling legislation.

⁴ General Laws of Massachusetts, Chapter 159.

⁵ Chapter 159, Section 12 of the General Laws of Massachusetts states, in pertinent part: "The Department shall, so far as may be necessary for the purpose of carrying out the provision of law relative thereto, have general supervision and regulation of, and jurisdiction and control over . . . (d) The transmission of intelligence within the commonwealth by electricity, by means of telephone lines or telegraph lines or any other method of communication, including the operation of all conveniences, appliances, instrumentalities, or equipment appertaining thereto, or utilized in connection therewith"

proposed rate decrease fails to yield sufficient compensation for the service rendered, to set a minimum rate, G.L. c. 159, § 20.

The Phase II Order, in part, created a new regulatory regime for Verizon's operation in a competitive environment. In addressing the breadth of its powers to craft a new regulatory regime, under a set of statutes that do not prescribe any particular form of economic regulation, the Department noted that,

While the General Court [(i.e., the Commonwealth's body of statutory law)] specifies that rates are to be "just and reasonable" and that rates should provide a utility with "reasonable compensation" with reference to the service provided, neither of these two statutes [(i.e., G.L. c. 159, §§ 14 and 20)] prescribe a particular method by which the Department must fulfill its statutory mandate of ensuring just and reasonable rates or limit the Department to a specific regulatory scheme, such as cost-of-service, rate of return ratemaking, or regulation through a price cap. (Phase II Order, at page 6) (Citations omitted).

It is clear that the very case relied upon in the Notice to question whether specific statutory authority is required to foster Department creation of a Commonwealth USF, the Phase II Order, supports the proposition that the DTE's scope of subject matter authority is very broad. Indeed, the Department's recent history is replete with examples of its exercise of regulatory authority under its general powers, without seeking or waiting for legislative or judicial intervention. Examples include the DTE's promulgation of customer billing standards, the institution of intraLATA (i.e., Local Access and Transport Area) competition, number pooling, and the filing and arbitration of interconnection agreements contemplated under the Act.

Finally, a more practical reason exists to support the Department's assertion of power to address the creation of a Commonwealth USF without specific statutory authority. Under its general powers to ensure just and reasonable rates and compensatory rates and charges, the Department presently maintains a policy, as

indicated in the Phase II Order, of requiring geographically deaveraged UNE rates, but averaged residential local exchange rates. The reason, however out of date it may be, for this policy is obvious – fostering a regime of relative parity between urban and rural residential rates by allowing the relatively high costs of rural service to be defrayed by rates in excess of costs in lower cost urbanized area.

While far from the scheme of explicit subsidization in high cost areas envisioned in a fully functioning competitive environment, the goal of the present scheme is the same as a modern USF system – the maintenance of rate affordability in all parts of the Commonwealth. Having determined, albeit indirectly, that the present scheme of Verizon’s implicit subsidization of rural residential services is a just and reasonable practice, the Department cannot be said to lack the requisite authority to investigate the creation of a more rational system required in the competitive era. Indeed, Section 254(e) of the Act expressly contemplates that states will transform implicit subsidies, such as those currently existing, into explicit subsidies as a response to an increasingly competitive marketplace. Simply put, the Department already exercises jurisdiction in the area of universal service and has all the jurisdiction required to reform and modernize that system in light of the critical and anti-competitive flaws suggested by Richmond NetWorx in its Request for an investigation into the creation of a Commonwealth USF.

B. The Department Should Initiate An Investigation Into The Establishment Of A USF For The Commonwealth

In order to advance statewide access to affordable telecommunications service in a competitive environment, the DTE should prescribe a program of support for the provision of basic and advanced telecommunications service that enables rates and services in high- and low-cost locations to be reasonably comparable. The program

should be established to ensure that quality services are available at just, reasonable and affordable rates throughout the Commonwealth. Competition should be promoted in all local telecommunications markets through sources of universal service support. Carriers should contribute to the fund on an equitable and nondiscriminatory basis. Support should be specific, predictable and sufficient, and should be competitively and technologically neutral.

IV. CONCLUSION

For the foregoing reasons, the Department has sufficient statutory authority under existing federal and Commonwealth laws to establish a Commonwealth USF and should initiate a proceeding to investigate its establishment.

Respectfully submitted,

Christa M. Proper
Vice President
Richmond Connections Inc.
d/b/a Richmond NetWorx

Dated: June 20, 2003